State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ADVOCACY ORGANIZATION FOR PATIENTS & PROVIDERS, a non-profit Michigan corporation, et al,

Plaintiffs-Appellants,

Supreme Court No. 124639

v

AUTO CLUB INSURANCE ASSOCIATION, et al,

Defendants-Appellees.

Court of Appeals No: 231804
Eaton County Circuit Court No: 96-1409-CZ

BRIEF OF AMICUS CURIAE, MICHIGAN CHAMBER OF COMMERCE

PROOF OF SERVICE

GROSS, NEMETH & SILVERMAN, P.L.C.
BY: JAMES G. GROSS (P28268)
Attorneys for Amicus Curiae
MICHIGAN CHAMBER OF COMMERCE
615 Griswold, Suite 1305
Detroit, Michigan 48226
(313) 963-8200

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES i

STATEMENT OF INTEREST ii

STATEMENT OF JURISDICTIONAL BASIS AND STANDARD OF REVIEW iii

STATEMENT OF QUESTIONS PRESENTED iv

ARGUMENT:

I. THIS COURT SHOULD RECOGNIZE THE "80th PERCENTILE" METHOD AS A VALID TOOL IN ADMINISTERING CLAIMS IN ACCORDANCE WITH THE LEGISLATURE'S CHARGE TO INSURERS TO PAY ONLY A "REASONABLE" AMOUNT. 1

RELIEF 6

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

INDEX OF AUTHORITIES

CASES **PAGE(S)**

AOPP v ACIA, 257 Mich App 365 (2003) 5

Dean v Auto Club Ins Ass'n, 139 Mich App 266 (1984) 5

Lakeland Neurocare Centers v State Farm, 250 Mich App 35, lv den, 467 Mich 909 (2002) 3

McGill v Automobile Association of Michigan, 207 Mich App 402 (1994) 5

Nasser v ACIA, 435 Mich 33 (1990) 3,4

Wood v DAIIE, 413 Mich 573 (1982) 3

STATUTES

MCL 500.3107(1)(a) 1

MCL 500.3142(1) 2

MCL 500.3148 4

MCL 500.3157 1

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF INTEREST

The Michigan Chamber of Commerce was formed in 1959 for the purposes, inter alia, of promoting conditions favorable to economic development in the State of Michigan. It consists of more than 6,300 businesses in all 83 counties of the State, representing a broad cross-section of the State's economy.

The Chamber is committed to fostering and supporting whatever measures are necessary to make Michigan an attractive place in which to live, work, and invest. Accordingly, any issue substantially affecting insurance rates and medical costs is of concern to the Chamber.

The Chamber and its members do not have the same degree of direct financial interest as the other Amici Curiae who have filed briefs. However, the ramifications of this Court's decision on the no-fault automobile injury reparations system will extend not only to the motoring public, but also to businesses who will bear the brunt of increased medical costs and insurance rates.

STATEMENT OF JURISDICTIONAL BASIS AND STANDARD OF REVIEW

The Chamber concurs in the statements of the parties and the other Amici Curiae.

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF QUESTION PRESENTED

I. SHOULD THIS COURT RECOGNIZE THE "80th PERCENTILE" METHOD AS A VALID TOOL IN ADMINISTERING CLAIMS IN ACCORDANCE WITH THE LEGISLATURE'S CHARGE TO INSURERS TO PAY ONLY A "REASONABLE" AMOUNT?

Amicus Curiae MICHIGAN CHAMBER OF COMMERCE contends that the answer should be, "Yes".

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

I. THIS COURT SHOULD RECOGNIZE THE "80th PERCENTILE" METHOD AS A VALID TOOL IN ADMINISTERING CLAIMS IN ACCORDANCE WITH THE LEGISLATURE'S CHARGE TO INSURERS TO PAY ONLY A "REASONABLE" AMOUNT.

The Chamber has reviewed the briefs submitted by the parties and the various Amici Curiae, and will not reiterate their arguments. It submits this brief to offer its own observations on the ancillary issue to which this Court directed the parties' attention: The propriety of the "80th percentile" method of evaluating the reasonableness of charges by health care providers.

The mechanics of the method are set forth in Defendants' Brief on Appeal at p 8-13.[1] The Chamber submits that it is a rational, efficient, and market-based approach to establishing the **presumptive**[2] reasonableness of charges for services.

The premise for this discussion is that the Legislature charged no-fault insurers with the obligation to pay only reasonable charges for services rendered.[3] However, the statute does

---

[1]That account appears to contain as much detail as the record allows. It is, however, more than sufficient to allow comment as to the propriety of the approach taken.

[2]The "80th percentile" method does not define per se the maximum that a no-fault insurer will pay for a particular service. Rather, it yields a recommendation that a charge not be paid. The insurer to free to pay more if ample reason is presented. Of course, if it arbitrarily refuses, it will be subject to the penalties imposed by the No-Fault Act.

[3]If not, this discussion is moot. For the record, the Chamber endorses the position of Defendants and their Amici Curiae that §§3107(1)(a) and 3157 explicitly require no-fault insurers to determine whether a charge is reasonable.

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

not define "reasonable". That situation demands that no-fault insurers develop a system which will provide some method for determining "reasonableness".

Moreover, they must do so in the context of processing tens of thousands of medical charges per year. The system must efficiently evaluate large numbers of charges promptly, because payment is due in 30 days. MCL 500.3142(1).

The "80th percentile" rule accomplishes that task admirably and in accord with the dispute resolution mechanism contemplated by the Legislature.

First, it employs a market-based approach. Unlike a relatively arbitrary fee schedule[4], the "80th percentile" method is based on what the providers themselves charge for their services. Moreover, it is not only premised on that economic reality, it is self-correcting in that the benchmark will move as the market dictates.

Second, use of the "80th percentile" method as a cutoff for presumptive reasonableness is perfectly rational. There is certainly nothing inherently reasonable about charging more than four out of five of one's colleagues for the same service. To be sure, there may be reasons in a particular case justifying the higher charge. The benchmark simply defines the point at which

[4]For the reasons cogently set forth in the Brief of Amicus Curiae Property Casualty Insurers Association of America, p 12-13, the "80th percentile" method is **not** a fee schedule.

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

the provider must present additional justification in order to be paid in full.

Third, based on additional information the insurer may have, it is free to accept or reject the recommendation of Review Works. It is also free to negotiate with a health care provider as to its charges. It is in the interest of both parties to resolve such disputes between themselves if at all possible. That is so because of the increased transactional costs of litigation.

Health care providers wish to avoid filing lawsuits because of the expense and inconvenience. If possible, reaching some short-term or (better) long-term compromise with the carrier is a much preferable solution.

Insurers also have incentives to avoid being sued. If unsuccessful, they face paying both no-fault and statutory judgment interest. Wood v DAIIE, 413 Mich 573, 589 (1982). Moreover, if the basis for denial is not reasonable, the insurer will pay the attorney fees of the health care provider. Lakeland Neurocare Centers v State Farm, 250 Mich App 35, 44, lv den, 467 Mich 909 (2002). Finally, if the parties are unable to agree, a jury trial will resolve the issue.[5] Nasser v ACIA, 435 Mich 33,

[5]Of course, the litigation must be between the health care provider and the no-fault insurer. If the charge is reasonable, it must be paid by the no-fault insurer. If it is not reasonable, it should not be paid by anyone. Plaintiffs' complaints about not be able to proceed directly against the insureds is not only unseemly, it is contrary to the intent of

(continued...)

53 (1990). That ultimate method of dispute resolution -- with its attendant risks -- may not be optimal. It is, however, the one expressly contemplated by the Legislature. MCL 500.3148.

Plaintiffs and their Amici Curiae have raised a number of "policy" reasons in support of their position that insurers should be barred from utilizing the "80th percentile" method. They also present a number of detailed -- and frequently inaccurate -- critiques of the method.

What is missing, however, is any suggestion as to a **feasible** alternative method for evaluating the reasonableness of tens of thousands of charges. That reticence would appear to be of a piece with the position of Plaintiffs and their Amici that no-fault insurers shall be precluded from making the inquiry in the first place. By eliminating the possibility of rationally and consistently[6] assessing reasonableness, they apparently hope to accomplish by indirection what they will likely not be able to achieve in a ruling on the principal issue presented.

What is also missing is any explanation from Plaintiffs or their Amici Curiae as to how adopting their position would

---

[5](...continued)
the Legislature that payment for services be the sole responsibility of the no-fault insurer.

[6]If insurers are unable to maintain consistency as to what they pay for a reasonable charge, they will be open in virtually every case to the accusation that their determination is arbitrary.

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

further the **undisputed** legislative intent to control the cost of the no-fault system:

> "It is to be recalled that **the public policy of this state is that 'the existence of no-fault insurance shall not increase the cost of health care**.' *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 274; 362 NW2d 247 (1984). Indeed, **'[t]he no-fault act was as concerned with the rising cost of health care as it was with providing an efficient system of automobile insurance**.' *Id.* at 273. To that end, the plain and ordinary language of §3107 requiring no-fault insurance carriers to pay no more than reasonable medical expenses, clearly evinces **the Legislature's intent to 'place a check on health care providers who have "no incentive to keep the doctor bill at a minimum."'** *Dean, supra* at 273."

McGill v Automobile Association of Michigan, 207 Mich App 402, 407-08 (1994) (emphasis added).

The Chamber certainly understands the economic rationality of Plaintiffs and their Amici Curiae attempting to maximum their income. However, when they attempt to do so to the detriment of the no-fault system and in plain contravention of the intent of the Legislature, they should be rebuffed by this Court.

In short, it does not appear that this Court needs to address the propriety of the "80th percentile" method in order to decide the legal issue upon which the Court of Appeals ruled. See AOPP v ACIA, 257 Mich App 365, 379-80 (2003). However, if it does, it should endorse it as an example of an acceptable manner in which no-fault insurers may discharge their statutory obligation to monitor the reasonableness of charges submitted to them. Enforcement of that legislative intent will preserve the cost-containment effects of the Act which Plaintiffs seek to dismantle.

RELIEF

Amicus Curiae MICHIGAN CHAMBER OF COMMERCE prays this Honorable Court to affirm the Court of Appeals decision in all respects.

GROSS, NEMETH & SILVERMAN, P.L.C.

BY: _____
JAMES G. GROSS (P28268)
Attorneys for Amicus Curiae
MICHIGAN CHAMBER OF COMMERCE
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200

Dated: October 22, 2004

GROSS, NEMETH & SILVERMAN, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200